

Is the U.S. Constitution constitutional? Developing a comprehensive vision of justice in a pluralistic democracy

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Abstract

The following lessons are intended for high school social studies teachers to engage students in a reflective analysis of the U.S. Constitution, the underlying assumptions about justice which contributed to its development, and its various interpretations via the U.S. Supreme Court. The question "Is the U.S. Constitution constitutional?" may seem redundant or obvious, however, this is meant as a rhetorical strategy to point out what the author sees as a flaw in judging laws, ethical dilemmas, and the structure of society by relying solely on the word "constitutional" as a comprehensive descriptor. Any action may or may not be deemed constitutional based on an interpretation of its conformity to the U.S. Constitution, however, the extent to which a vision of justice in a pluralistic democracy can rely only on this document to develop those ideals is an issue worth exploring in any social studies classroom.

Summary of Daily Lesson Plans

Lesson One:

Students will discuss the formation of a just society, based in part on the work of John Rawls in *A Theory of Justice* (1971) as well as analyze the development of the U.S. Constitution using a position paper entitled "The Philadelphia Convention and the Creation of a Just and Viable Republican Government: An Analysis of Congruence," written by Daniel Byrd (2004).

Lesson Two:

Students will analyze the nature of interpretations regarding the U.S. Constitution by looking at court decisions of their own choosing and discussing the position paper "Deriving Justice from the U.S. Constitution: Supreme Court Decisions and the Absence of a Moral Consensus," written by Daniel Byrd (2003).

Lesson Three:

Students will examine the ideas contained in the U.N. Universal Declaration of Human Rights and deliberate the extent to which the U.S. Constitution provides a comprehensive framework for understanding and guaranteeing these same rights. Students will write and present their own reaction papers which address an example of injustice or a violation of any human right as defined by the individual student.

Lesson Plan 1

Subject: U.S. History, U.S. Government

Ability Level: low to advanced

Unit: The U.S. Constitution

Topic: Analyzing the U.S. Constitution and Justice in Society

NCSS Thematic Strands

VI Power, Authority, and Governance (a,b,c,d,h,i,j)

X Civic Ideals and Practice (a,b,c,d,h,i)

Introduction to Lesson

Objectives: Students will be able to:

Analyze their own and others' notions of a just society

Understand ideas about justice that formed the U.S. Constitution

Rationale: The purpose of this lesson is to expose students to the difficulty encountered when trying to articulate a consensus on the meaning of justice as applied to the principles that govern a democratic society.

Materials: paper, pens, copies of position paper (attached)

Student Instructions: Students will create their own vision of a just society by articulating what laws and societal structures would be necessary in their conception. Students will also analyze some of these same factors when reading "The Philadelphia Convention and the Creation of a Just and Viable Republican Government: An Analysis of Congruence."

Links: This lesson can be linked to previous classroom activities and discussions about the development of democratic principles in a pluralistic society.

Body of Lesson

Activity 1

Introduction: The instructor will begin class by explaining the topic for the day. The class will be based around a deliberation of ethical principles and the process by which individuals evaluate competing claims of justice.

Activity: Place students in groups and ask them to think about the question, "What would a just society look like?" Students are told that they will create their own laws and principles to govern this society, however, they are to imagine this process taking place prior to knowing what social position they will eventually occupy (i.e. all the possibilities related to wealth, gender, religious beliefs, political affiliation, nationality, etc.) This constraint is what John Rawls would refer to as the "original position" where choosers operate from behind a "veil of ignorance." After completing this task, students are given index cards with different social positions described and asked if the principles of a just society they developed are fair to everyone, regardless of that social position.

Transition: Link the idea of making ethical decisions concerning society to the actual debates surrounding the development of the U.S. Constitution.

Activity 2

Introduction: Ask students to consider the incredible difficulty of creating a document whose purpose is to govern society in a fair and equitable manner. Give examples of other documents, such as the Magna Carta, the Declaration of Independence, and any others which illustrate this point.

Activity: Students will read the paper “The Philadelphia Convention and the Creation of a Just and Viable Republican Government: An Analysis of Congruence.” Students will then participate in a structured deliberation referred to as “Inside/Out” where the class is split into 2 groups. A circle is formed in the middle of class where one group can sit, facing each other, and discuss what they feel are the most important aspects of this account. This is the “Inside” group. The “Outside” group will sit in a larger circle, also facing inward, where they will actively listen and take notes on the discussion. After everyone in the Inside group has spoken, the instructor will ask students to switch places. The new Outside group will also listen, without speaking, and take notes on the discussion. The Inside group will continue this activity until everyone has contributed.

Closure for lesson: Instructor will ask students to continue reflecting on their own and others’ notions of justice and how this concept can potentially create a fair and democratic society via the U.S. Constitution. Students will be asked to compare these definitions of justice with those articulated in various U.S. Supreme Court rulings on the following day.

Lesson Plan 2

Subject: U.S. History, U.S. Government

Ability Level: low to advanced

Unit: The U.S. Constitution

Topic: Analyzing the U.S. Constitution and Justice in Society

NCSS Thematic Strands

VI Power, Authority, and Governance (a,b,c,d,h,i,j)

X Civic Ideals and Practice (a,b,c,d,h,i)

Introduction to Lesson

Objectives: Students will be able to:

Analyze notions of a just society vs. decisions made by the U.S. Supreme Court

Understand how the term “constitutional” is a conception without consensus when “justice” is the intended goal

Rationale: The purpose of this lesson is to expose students to the difficulty encountered when trying to articulate a consensus on the overlapping, yet sometimes contradictory claims that an action or law is “constitutional” vs. “just.” Students will also decide the extent to which they feel the U.S. Constitution is a completely comprehensive document with regard to all considerations needed to form a just society.

Materials: paper, pens, copies of position paper (attached)

Student Instructions: Students will choose a U.S. Supreme Court case and examine the majority and dissenting opinions related to its outcome. Students will then read “Deriving Justice from the U.S. Constitution: Supreme Court Decisions and the Absence of a Moral Consensus.”

Links: This lesson can be linked to previous classroom activities and discussions about the extent to which the U.S. Constitution provides an adequate framework for making decisions concerning justice.

Body of Lesson

Activity 1

Introduction: The instructor will begin class by explaining the topic for the day. The class will be based around a deliberation of decision making, ethical principles, and their congruence with the word “constitutional” through an analysis of U.S. Supreme Court decisions.

Activity: Students will choose a court decision to examine from examples provided by the instructor. This can be done individually or in small groups. The instructor may want to choose cases where there was a 5-4 split in voting to illustrate the difficulty of gaining consensus, even at this level in government. Of particular interest may be decisions that are largely viewed as unjust by contemporary standards.

Transition: Link the idea of making ethical decisions concerning society to the basis for making rulings about the constitutionality of a given action, law, etc.

Activity 2

Introduction: Ask students to consider the incredible difficulty of getting a moral consensus on interpretations of the U.S. Constitution.

Activity: Students will read the paper “Deriving Justice from the U.S. Constitution: Supreme Court Decisions and the Absence of a Moral Consensus.” Afterwards, the instructor will ask students to define the word “constitutional” and then lead a discussion of the problems that can result if that is the only framework to judge the inherent ethical nature of principles which govern society. Potential questions to consider may include:

- 1- What happens if a nation’s constitution is unjust in some manner?
- 2- Are there important aspects of society for which the U.S. Constitution provides no framework to understand?
- 3- Are there any human rights which are not mentioned in the U.S. Constitution?

Closure for lesson: Link this deliberative process with the value of considering multiple perspectives on justice. Explain that other attempts have been made throughout history to articulate a comprehensive view of justice and human rights. Instructor will ask students to continue reflecting on their own and others’ notions of justice and how this concept can potentially create a fair and democratic society via the U.S. Constitution. Students will be asked to compare this document with the U.N. Universal Declaration of Human Rights on the following day.

Lesson Plan 3

Subject: U.S. History, U.S. Government

Ability Level: low to advanced

Unit: The U.S. Constitution

Topic: Analyzing the U.S. Constitution and Justice in Society

NCSS Thematic Strands

VI Power, Authority, and Governance (a,b,c,d,h,i,j)

X Civic Ideals and Practice (a,b,c,d,h,i)

Introduction to Lesson.

Objectives: Students will be able to:

Analyze and discuss the idea of universal human rights.

Articulate and discuss their own examples of societal justice and human rights.

Rationale: The purpose of this lesson is to expose students to different ways of describing the structure of a just society, with particular emphasis on the way this concept leads to ideas around human rights.

Materials: paper, pens, copies U.N. Universal Declaration of Human Rights (attached)

Student Instructions: Students will examine the human rights contained in articles from the U.N. Universal Declaration of Human Rights. Students will then write a short paper describing a human right they feel is currently being violated somewhere in the world.

Links: This lesson can be linked to previous classroom activities and discussions about the purpose of the U.S. Constitution and other historical documents which have dealt with similarly situated concerns about the structure of a just society.

Body of Lesson

Activity 1

Introduction: The instructor will begin class by explaining how human rights have been conceived in various historical documents, including the U.S. Constitution and the Universal Declaration of Human Rights.

Activity: Students will be divided into three equally sized groups and asked to read the U.N. Universal Declaration of Human Rights. Group 1 can focus on Articles 1-10, Group 2 on Articles 11-20, and Group 3 on Articles 21-30. After the students have had time to read through these Articles, an open discussion can be initiated for the entire class where students are given a chance to critique the rights enumerated in this document.

Transition: Link the attempt to define human rights with the idea that every individual must understand and be able to recognize when their own and other's rights are being violated in order to maintain the ideals contained in the U.S. Constitution.

Activity 2

Introduction: Ask students to think about the rights they feel all humans should possess as well as a scenario where an individual or group has had their rights violated.

Activity: Students will be asked to write a 1 page “reaction paper” where they articulate an inviolable human right and give an example of this right being violated. Students will be free to use the U.S. Constitution and the Universal Declaration of Human Rights as references but this does not have to be a requirement. Students should include possible resolutions for the violations they cite.

End-activity: After completing the reaction papers, students will be asked to share their examples with the entire class. While giving a brief synopsis of their reaction papers, other students will generate questions to ask the presenter. This entire process can be limited to just a few minutes for each student and may require extra time depending on the size of the class.

Closure for lesson: The instructor can reiterate to students how the idea of human rights involves many aspects of developing a conceptual framework for understanding justice within a society. The development of the U.S. Constitution is one example of this process. The importance of continuing to analyze and further develop one’s own ideas around this topic should be emphasized in an effort to guarantee the realization of these rights within a fair and just society.

Appendix

1- Byrd, D. (2004, unpublished). "The Philadelphia Convention and the Creation of a Just and Viable Republican Government: An Analysis of Congruence."

2 - Byrd, D. (2003, unpublished). "Deriving Justice from the U.S. Constitution: Supreme Court Decisions and the Absence of a Moral Consensus."

3 – The U.N. Universal Declaration of Human Rights (originally published in 1948).
Also found at <http://www.un.org/Overview/rights.html>

The Philadelphia Convention and the Creation of a Just and Viable Republican Government: An Analysis of Congruence

No government is free from imperfections and evils, and improper elections in many instances, are inseparable from republican government. But compare these with the advantage of this form in favor of the rights of the people, in favor of human nature.
- George Mason

Delegates to the Philadelphia Constitutional Convention faced the paramount challenge of creating a document which simultaneously embodied the ideals of justice and liberty while establishing a new form of republican government. The preparation of this document was, in part, the result of previous attempts to establish the rights of individuals and their relationship with the state. This evolution of deliberation eventually led to a political conception intended to protect individuals through a justly structured and representative political institution. To what extent, then, can we say that the delegates successfully created a just and viable republican government? The purpose of this paper is to analyze the focus of these delegates' attention and debates, and by doing so, determine their relative ability to conceive a just political institution.

Although the problems faced by these delegates can be conceptualized as states versus national rights or devising a means of constitutional ratification, the fundamental construct most significant for understanding the framing of the Constitution stems solely from one's notion of justice. In other words, the means by which I evaluate the delegates' true challenge is deontological and concerned only with what constitutes the *right* in and of itself. The other problems are teleological and seek to define the *right* in terms of the *good*, where the right (and consequentially just) action is the maximization of that particular good. Here, the extent to which the framers developed a *just* system is equated with the extent to which that system is *fair*. By using this template, James Madison's notes provide an account suggesting these delegates spent more time discussing the structure and viability of a republican government and much less time on the principles or definition of justice by which these competing claims could be evaluated. At least initially, it seems implausible to claim a just system is being created when the delegates provide no agreed upon articulation of what justice actually *is*. More time is spent discussing representation and the relationship between states and the national government than on the fundamental principles of justice and/or inviolable rights to which every individual is entitled.

The Articles of Confederation gave the national government power to declare war, make peace, and sign treaties. The Articles, however, created no separate executive department to enforce the acts of Congress and no national court system to decide the meaning of laws. Each state functioned independently by pursuing its own interests rather than those of the nation as a whole. In addition, the Confederation didn't recognize the differences in population among the states. Each state had only one vote in Congress. Amending the Articles was seen as a necessary step to structure a political system in which all persons had equal rights and representation. James Madison described the resulting difficulties as "1- the natural repugnance of the parties to a relinquishment of power, 2- a natural jealousy of its abuse in other hands than their own, 3- the rule of

¹ As recorded by James Madison, in Solberg, Winton U., *The Constitutional Convention and the Formation of the Union*. Chicago: University of Illinois Press (1990) 108.

suffrage among parties unequal in size, but equal in sovereignty, 4- the ratio of contributions in money and in troops among parties..., [and] 5- the selection and definition of powers, at once necessary to the federal head, and safe to the several members.”² The problems of protectionism, self-interest, and political bargaining were addressed over and over again by the delegates. The distribution of power and not the distribution of justice received the most attention throughout the course of the convention. Perhaps Alexander described the atmosphere most succinctly when he simply stated, “Men love power.”³

There were a few delegates who tried to address the issues of individual rights and justice but these attempts were few and far between and never received adequate or conclusive attention. George Mason said, “Every selfish motive...ought to recommend such a system of policy as would provide no less carefully for the rights and happiness of the lowest than of the highest orders of citizens.”⁴ James Wilson was also described as a proponent of equal rights but once again, we never read an enumeration of what those rights should look like in a republican government.⁵

A majority of the delegates’ conflicts involved the rights of the states. An important distinction within this conception is the attention paid to states’ rights, not individual rights and liberties. Nonetheless, delegates at this time feared giving too much power to a central government, yet their experience under the Articles of the Confederation had taught them the consequences of an inefficient national government. Likewise, the debates over representation addressed elements within a conception of justice, but not the concept itself. The Constitution explicitly states that it is supposed to “promote the general welfare” yet this population arguably did not include women, indentured servants, Native Americans, or slaves.” It allowed for a system that supported the superiority of white masters and the inferiority of black slaves. Still, this distorted idea of a just system achieved a consensus that lasted for many years until an amendment finally abolished slavery. Not only was “justice” hard to define, practices that matched this ideal were also difficult to establish.

John Rawls, in *A Theory of Justice*, describes a four stage sequence in which a constitutional convention should take place. This is an attempt to explain how legislators would evaluate competing claims, primarily by engaging in reflective deliberation and ending with the application of rules to particular cases. This process is the application of Rawls’ theory to a construction of just legislation. He assumes that “the two principles of justice already chosen define an independent standard of the desired outcome.” The two principles of justice read as follows: 1) each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others and 2) social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.⁶

As a means of determining whether a just government was created, we must first

² Madison, James. *A Sketch Never Finished nor Applied*. Printed by W.W. Norton and Company: New York 1987.

³ Solberg, 142.

⁴ Solberg, 85.

⁵ Solberg, 217.

⁶ Rawls, John. *A Theory of Justice*. Massachusetts: Harvard University Press, 1971.

determine the extent to which framers of the U.S. Constitution were able to engage in the process of reflective deliberation in order to reach considered judgments about principles of justice. The only way to produce a just constitution would be “by moving back and forth between the stages of the constitutional convention and the legislature.”⁷ Although the Constitution was written in order provide equality for all persons, the end results were such that some individuals enjoyed greater privileges than others (i.e. non-minorities). Rawls produces five formal constraints of the concept of right that he believes are necessary in choosing ethical principles. Briefly stated, these constraints require that principles should be 1) general, 2) universal in application, 3) publicly acknowledged and accepted, 4) able to impose an ordering on conflicting claims and 5) final and conclusive, without the need for an appeal to higher standards.⁸ If we take these constraints and compare them to the principles framed at the Philadelphia Convention, we find that 4 of the 5 claims could arguably be satisfied but the fourth claim presents a significant problem because there is no means by which competing claims can be ordered.

These delegates espoused the idea that all are created equally and should therefore share the same liberties, but the means by which these ideals can be implemented is still quite vague. The closest approximation of applying these ideas is seen in the amendments to the Constitution. One might argue that amendments are the result of reflective deliberation, but in this case, the deliberation took place *after* the doctrine was conceived rather than *before*.

The Constitution only goes so far as to set up the political institution, however, without explicit concern for any other social or economic systems. No mention is made regarding distributive justice or the inviolable rights of individuals. The main focus of the Constitutional Convention was to set up an orderly political system, one that forms a republican based democracy. A more detailed account of fair social and economic policies is simply left up to elected officials. Granted, this form of a democracy leaves the potential for such social and economic policies to be decided, however, the Constitution does not successfully create a unified and just political system.

A constitution should be a “just procedure satisfying the requirements of equal liberty and second, it is to be framed so that all of the feasible just arrangements, it is the one more likely than any other to result in a just and effective system of legislation.”⁹ The U.S. Constitution allows for a viable republican government, meaning it does not necessitate a system that is blatantly unjust, but it does not explicitly create a system that excludes the possibility for injustice. Without a more detailed account of the prioritization of principles, the limited scope of the Philadelphia Convention allows for these injustices in the same way that “an arrangement may be unjust without the institution itself being so. Similarly, an institution may be unjust although the social system as a whole is not.”¹⁰

⁷ Rawls, 74

⁸ Rawls, 113.

⁹ Rawls, 194.

¹⁰ Rawls, 50.

Deriving Justice from the U.S. Constitution: Supreme Court Decisions and the Absence of a Moral Consensus

“The twentieth century has hardly been distinguished either by its observance of agreed moral codes or by its concentration on ethical inquiry...morality is relative if not utterly meaningless, and [there is]a disposition to regard ethical inquiry as frivolous, irrelevant.”
- D. Waldo (1980)

A popular idea of individual rights, taken from the U.S. Declaration of Independence is that all persons deserve “life, liberty, and the pursuit of happiness.” We also see remnants of these ideals in the Preamble to the U.S. Constitution:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

A constitutionally based government is meant to secure these individual rights, and the judiciary body serves as a mediator when competing claims of justice arise. In fact, Chief Justice William Rehnquist (2003) once noted “the creation of an independent constitutional court...is probably the most significant single contribution the United States has made to the art of government.” A constitutional democracy is distinguished by its capacity to provide both a majority rule and protection of the rights of individuals. In doing so, however, it at least seems plausible that unintended consequences would occasionally result given the conditions of a majority rule. The purpose of this paper is to explore the dilemma that results from issuing judicial decisions in the absence of a moral consensus.

Waldo’s quote highlights the difficulty deeply embedded in attempts to reach widespread agreement on issues of morality and ethics. If true, any notion of a moral consensus in a diverse culture may seem impossible. Appeals to different moral authorities and philosophies hamper the ability of the U.S. Supreme Court to issue rulings with a discernable set of universal beliefs. Instead, the Court’s decisions are often said to represent one side of a dichotomous relationship (i.e. activist vs. restraintist, left vs. right, cooperative vs. dual federalist, or even Republican vs. Democrat). Opinions are sometimes justified on the basis that they passed the rational basis, strict scrutiny, intelligible principle, or direct/ indirect tests. Chemerinsky (2012) remarks, “The Supreme Court’s opinions rarely acknowledge the indeterminacy of the issues or the value choices involved. Quite the contrary, the opinions are written to make it seem that there is only one correct result and that it was derived in a formalistic fashion that excludes individual value choices.” All too often, a battle of semantics ensues. Opinions are written to “make decisions seem restrained rather than activist” and dissents usually “criticize decisions as activist and not restrained” (Chemerinsky 2019). We have “nothing in the way of a comprehensive and systematic treatise” and we “lack the agreed beliefs which would enable us to construct an order of priority” for competing claims (Waldo 502).

Justice is instead derived from interpreting the U.S. Constitution and developing individual notions of the public interest. Even if the public interest was a concept free

from ambiguity, acting on the behalf of a majority can sometimes lead to the violation of individual rights. For instance, slavery was once viewed as a policy that served the greater public interest but is now considered morally unacceptable. What guidelines, then, is the Court supposed to use when issuing decisions that can unintentionally create or perpetuate social inequalities? There is a substantial need to explore the principles of social justice (or lack thereof) which guide the decision making process itself...the point at which Supreme Court justices use their own judgments to assess the validity and/or constitutionality of competing claims. According to Chemerinsky (2010), "The outcome of the vast majority of Supreme Court cases is indeterminate in the sense that reasonable justices and people can differ as to the proper interpretation of the Constitution as it applies to a specific case."

Although the Constitution was written, in part, to provide a measure of equality and fairness for all persons, the end result was such that judges are often left to their own personal sense of justice when deciding cases. These interpretations involve a balancing of competing principles, and this inherently requires a value choice (Chemerinsky 2011). The preamble to the Constitution states that it seeks to "establish justice, ... promote the general welfare, and secure the blessings of liberty to ourselves and our posterity..." These ideas provide a general sense that all people are supposedly equal, and that we all possess certain inviolable rights, but how this should be applied in any specific case is still unclear. In order for these ideas of equality to be reflected in society, there needs to be a more specific, less abstract interpretation.

The U.S. Constitution sets up a political institution, however, it does so without explicit concern for other social or economic systems. No mention is made regarding distributive justice or the rights of individuals. In this sense, the Constitution fails to provide an adequate framework for ensuring that unjust legislation will not be upheld by the Court. John Rawls (198) believes that "all citizens should have the means to be informed about political issues. They should be in a position to assess how proposals affect their well-being." Without a substantive doctrine to base claims of justice upon, judges are more or less free to uphold any policy they feel will prevent undesirable circumstances.

A constitution should be a "just procedure satisfying the requirements of equal liberty and second, it is to be framed so that all of the feasible just arrangements, it is the one more likely than any other to result in a just and effective system of legislation" (Rawls, TJ, 194). The U.S. Constitution attempts to establish a fair and effective judicial system, meaning it does not create a system that is obviously unjust, but it does not explicitly describe this system in a way that excludes the possibility for injustice to be an integral part of the system as well. The limited scope of the Constitution allows for these injustices in the same way that "an arrangement may be unjust without the institution itself being so. Similarly, an institution may be unjust although the social system as a whole is not." (Rawls, TJ, 50). Without a more detailed account of the prioritization of principles, our current judicial system allows for unjust consequences within our public institutions.

We can describe the ethical foundation on which most justices make their choices as being utilitarian in nature. This philosophical framework for decision making, whether acknowledged or not, is teleological in that it defines the "good" separately from the

“right.” This “good” may be defined in terms of constitutionality, interpretations of previous court decisions, or the often self-defined notion of preferred freedoms. The right action to take is that which maximizes the good (as individually defined) for the greatest number of people, hence the utilitarian nature. The problem with this ideology occurs when the “greatest good” or the “public interest” somehow interferes with inviolable individual rights.

Judicial decisions are often a balancing act that does not rely on a strict adherence to universal moral principles, but a method which satisfies as many competing interests as possible. Intriguing is the idea that a “higher law” exists. This concept “holds that there is a source and measure of rightness that is above and beyond both individual and government” (Waldo 503). In terms of the ethical considerations inherent in judicial rulings, this leads us towards a deontological theory, one in which right action is considered to be right in and of itself. The right action is not defined in terms of another “good” to be maximized. This seems quite appealing when faced with the challenge of forming a judiciary which is based solely on principles of justice and fairness. The closest semblance of this political conception may lie in the work of John Rawls.

John Rawls presents his political theory as one in which deliberators, behind a veil of ignorance, would choose principles of justice that were fair and equal to all persons. Values would compete with one another and require what Rawls refers to as reflective deliberation in order to decide what resulting claims uphold the fundamental ideals of liberty, justice, and equality (Rawls 19). Deliberators in this position would eventually form considered judgments on various issues which could then be used in the original position to establish principles of justice. These principles would supersede any other appeals to authority so far as Rawls is concerned. The two principles of justice read as follows: 1) each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others and 2) social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all (Rawls 53). The two principles of justice are meant to reflect the agreements that choosers, who know nothing of their potential social position, would agree upon. These principles should then be able to ensure the fairness of any policy, without regard to political bargaining and other potential forms of unethical decision making. Waldo (504) developed a “map” of ethical obligations. In doing so, he further illustrates the penetrating desire for sound, ethical decision-making. Using Rawls’ framework, Waldo should have included an “obligation to justice” which would supersede any other claim. Referring to the role of justice, Rawls (3) states, “Laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.”

Even with its imperfections, Ronald Dworkin (81) believes that a “constitution of principle, enforced by independent judges, is not undemocratic.” He argues that it is appropriate for the American judiciary to be the final authority in the resolution of questions of political morality. Dworkin describes the process of interpreting basic liberties from the Constitution as a “moral reading.” Moral principles are drawn from this and applied to concrete cases. He feels that judicial review is actually required by a democracy to endure that democratic principles are upheld. The judiciary here is a

necessary extension of a democratic society. Crucial to this process, however, is the ability of such choosers to make decisions consistent with democratic rule. So although a judiciary may be well placed to protect the democratic commitment to equality, we can still say that an agreed upon set of moral principles is necessary to ensure consistently just decisions.

A broad conception of justice plays an integral role in the formulation of ethical policy making procedures. One must be cognizant of the potential for inequalities in society and the extent to which judicial decisions can ameliorate social injustice. Understanding the connection between judicial decisions and ethics is fundamental to the creation of a just political institution. Communicating that connection to the public is the first step towards a justly ordered society.

Unfortunately, we are unable to attain a system of pure procedural justice. We instead are left with a form of imperfect procedural justice where “there is an independent criterion for the correct outcome, [but] there is no feasible procedure which is sure to lead to it (Rawls 75). For example, within the court system guilty parties are ideally convicted of their crimes, however we have no means to ensure this outcome. Rather than resembling a theory of justice as fairness, our current system devolves into an intuition based, majority rule structure. Rawls believes that his theory is an ideal, rather than an immediately practical or consequential theory. If, however, Rawls succeeds in developing a theory that most closely resembles a just political structure, it should at least serve as a basis for comparing our existing conceptions of ethics within judicial review.

Finally, it is the moral obligation of all U.S. Supreme Court appointees to move beyond the vague and unsatisfactory notions of justice which have dominated rulings in the past. Ultimately, ethical behavior depends on “the people who aspire to and gain public office” (Fesler 363). Ethical behavior includes not only specific job related duties but the consequences of court decisions as well. Are just decision making principles possible in the absence of a moral consensus? To some degree they are, but acknowledging that just decision making principles are possible does not illustrate how we arrive at those agreed upon concepts (Thompson 451). The implications that a moral consensus illustrates for judicial review are enticing and at the same time idealistic. Judicial review, at the very least, indirectly affects all members of society, and consequently is an area worthy of our attention. To the extent that rethinking our approach towards these issues may cultivate a greater appreciation for social justice, we can also say that rethinking our approach will assuredly increase our chances of deriving justice from the U.S. Constitution, and in doing so improve the lives of every individual in our society.

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On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights the full text of which appears in the following pages. Following this historic act the Assembly called upon all Member countries to publicize the text of the Declaration and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories."

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Everyone has the right to life, liberty and security of person.

Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security

in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.